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### Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. ~~55~~ 6

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EDWARD L. FOGARTY, AS TRUSTEE IN BANK-  
RUPTCY OF THE INLAND WATERWAYS, INC.,  
PETITIONER,

vs.

THE UNITED STATES OF AMERICA AND NAVY  
DEPARTMENT—WAR CONTRACTS RELIEF  
BOARD

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

PETITION FOR CERTIORARI FILED JANUARY 20, 1950.

CERTIORARI GRANTED MARCH 13, 1950.

# United States Court of Appeals

EIGHTH CIRCUIT

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**No. 13,857**

CIVIL

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**EDWARD L. FOGARTY, AS TRUSTEE IN BANK-  
RUPTCY OF THE INLAND WATERWAYS, INC.,  
A CORPORATION, APPELLANT,**

vs.

**UNITED STATES OF AMERICA AND NAVY  
DEPARTMENT—WAR CONTRACTS RELIEF  
BOARD, APPELLEE.**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA**

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**FILED MARCH 19, 1949.**

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Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit, at the May Term, 1949, of said Court before the Honorable Archibald K. Gardner, Chief Judge, and the Honorable Seth Thomas and the Honorable Walter G. Riddick, Circuit Judges.

Attest:

E. E. KOCH,

Clerk of the United States  
Court of Appeals for the  
Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 19th day of March, A. D. 1949, a transcript of record pursuant to an appeal taken from the United States District Court for the District of Minnesota, was filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, in a certain cause wherein Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a Corporation, was Appellant, and United States of America and Navy Department-War Contracts Relief Board, were Appellees.

Printed record on which the appeal was heard in the United States Court of Appeals for the Eighth Circuit is in the words and figures following, to-wit:

[fol. 1] In The District Court Of The United States  
For The District Of Minnesota  
Fifth Division

Edward L. Fogarty, as Trustee in Bankruptcy of the In-  
land Waterways, Inc., a Corporation, Petitioner,  
vs.  
United States Of America and Navy Department—War  
Contract Relief Board, Respondents.

On Appeal from the War Contracts Relief Board.

Complaint And Petition Re: Appeal From War Contracts  
Relief Board Navy Department.

Edward L. Fogarty, as Trustee in Bankruptcy of the In-  
land Waterways, Inc., a Corporation by Rollo N. Chaffee  
and Blum & Jacobson, his attorneys, respectfully repre-  
sents unto this Honorable court as follows:

1. That this is a petition seeking a determination by  
this court of the equities involved in the claim of the plain-  
tiff against the United States of America and United States  
Navy Bureau of Supplies and Accounts pursuant to an Act  
passed by the 79th Congress being Public Law #657 and  
entitled "An act to authorize relief in certain cases where  
work, supplies or services have been furnished for the Gov-  
ernment under contract during the war".

2. That the complaint is filed pursuant to the provisions  
of said Act aforesaid providing for the right of the claim-  
ant to petition any Federal Court of competent jurisdiction  
for relief if such claimant is dissatisfied with the action of  
the Department.

3. That this court is a proper Federal Court of compe-  
tent jurisdiction and has jurisdiction of the parties hereto  
and the subject matter hereof.

4. That the claim of the plaintiff herein was forwarded to the United States Navy Bureau of Supplies and Accounts on to-wit: the 1st day of February, 1947 and the receipt of said claim was duly acknowledged. That a true and correct copy of said claim or of the original claim so filed, will be produced as the time of the hearing herein.

[fol. 2] 5. That the total loss sustained by the claimant and as set forth in said claim aforesaid and filed with the United States Navy Bureau of Supplies and Accounts is in the sum of \$328,804.42; that the said loss was sustained by virtue of the following contracts of the Inland Waterways, Inc. with governmental agencies as follows:

A. Contract #Nos 91957 was entered into on September 18, 1941 with the Navy Department, Bureau of Supplies and Accounts for the sum of \$275,450.00. It cost the Inland Waterways, Inc. \$418,284.61 to perform said contract. It obtained from the Government \$228,118.33 in addition to which the Government received a cash discount of \$191.30, making a total credit of \$228,309.63. The net loss claimed on this contract is \$189,974.93.

B. Contract [Nobs] 147 was entered into on April 16, 1942 with the Navy Department, Bureau of Supplies and Accounts. The contract price was \$232,068.00. It cost Inland Waterways, Inc. \$330,211.65 to perform the contract. It obtained from the Government \$222,118.80. The loss claimed on this contract is \$102,093.65.

C. Contract #NXs 3309 was entered into on April 20, 1942. The contract price was \$52,695.00. It cost Inland Waterways, Inc. \$74,752.67 to process said contract. The claimant obtained \$47,425.60 from the Government to apply on said contract. The net loss claimed thereon is \$27,327.07.

D. Contract #NXss 3309 was entered into on June 30, 1942 with the Navy Department, Bureau of Ships for the sum of \$100,500.00 and supplemented by Contract #NXsss 3309 on October 30, 1942 which was for the sum of \$100,500.00. The cost of production of both of these contract until the date of cancellation was \$45,380.95. The claimant obtained \$35,972.18 from the Government to apply on said contracts. The net loss claimed thereon is \$9,408.77.

6. That on or about on to-wit: the 3rd day of July, 1947 the Navy Department, War Contract Relief Board made a final determination of the claim filed by the complainant herein wherein and whereby the said claim aforesaid was disallowed and refused; the said determination being predicated solely upon the fact that the settlement of all claims arising out of the contracts in question was the subject matter of a release between the Government and the claimant which constituted final action on the requests for relief made, within the meaning of Public Law #657 and [fol. 3] Section 204 of Executive Order #9786 as more fully appears in the determination of the War Contract Relief Board hereto attached and made a part hereof as Exhibit A.

7. That Section 204 of Executive Order #9786 hereinabove referred to provides: "No claim for loss under any contract or sub-contract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date." (Underlining ours)

8. That it is clear, from a reading of the "Final Determination" hereto attached and marked Exhibit A, that the decision of the Board was predicated solely upon the underlined portion of Section 204 of Executive Order #9786.

9. That the claim filed with the United States Navy Bureau of Supplies and Accounts was filed pursuant to the Act passed by the 79th Congress being Public Law #657 and which provides in part under Section 2A thereof: ".....and shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U. S. C., Supp. IV, app. sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, sec. 101-125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act."

10. That Section 3A of the Act provides: ".....but a previous settlement under the First War Powers Act, 1941,



or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act."

11. That the claim of the plaintiff herein, therefore, was not determined on its merits and that the relief to which the plaintiff is entitled was denied solely and only upon a misconception of the rights of the plaintiff as set forth in the Act of Congress hereinabove referred to, by the act of the Board in following an Executive Order which is in direct conflict with the provisions and expressed language of the Act itself.

Wherefore your petitioner prays that this Honorable court determine the equities involved in the claim of the plaintiff and determine the amount due to the plaintiff herein pursuant to the claim heretofore filed as hereinabove set [fol. 4] forth and to enter an order directing the War Contracts Relief Board Navy Department to settle the claim of the plaintiff herein in accordance with the findings of this court.

**EDWARD L. FOGARTY,**  
As Trustee in Bankruptcy of the  
Inland Waterways, Inc., a Corporation.

**ROLLO N. CHAFFEE,**  
**BLUM & JACOBSON,**  
Attorneys for Plaintiff.

By Rollo N. Chaffee,  
First National Bank Building,  
Duluth, Minnesota.

State Of Minnesota,  
County Of St. Louis—ss.:

Edward L. Fogarty, being first duly sworn upon his oath deposes and says that he is the duly elected and qualified Trustee of Inland Waterways, Inc., a corporation; that he has read the above and foregoing Complaint by him subscribed and knows the contents thereof and that the same is true.

**EDWARD L. FOGARTY**

Subscribed And Sworn to before me this 1st day of December, 1947.

(Seal)

ROLLO N. CHAFFEE,  
Notary Public,  
St. Louis County, Minn.

My Commission expires May 25, 1949.

[fol. 5]

Exhibit "A".

Navy Department

War Contracts Relief Board

In the Matter of the Claim of

Inland Waterways, Inc.

Final Determination.

The claim of Inland Waterways, Inc., having been filed with the Navy Department on or before the 7th day of February, 1947, under the provisions of Public Law 657, 79th Congress, 2nd Session and Executive Order No. 9786 issued pursuant to the provisions thereof on the 5th day of October, 1946; having been verified to the extent deemed necessary; having been submitted to the Navy Department War Contracts Relief Board set up in the Navy Department as the central agency to receive, consider, settle and adjust such claims as required by said Executive order; and the Board having received such claim under the rules promulgated by the Board pursuant to the authority of said Executive order and of the Secretary of the Navy, Now Then,

The Navy Department War Contracts Relief Board hereby makes and files the following Findings of Fact and Determination with respect to such claim:

#### Findings Of Fact

1. The claim of Inland Waterways, Inc., is a claim for losses alleged to have been incurred in the performance of Contracts NOs-91957, NObs-147 and NXs-3309 with the Navy Department, covering the construction of submarine chasers and planes rearming boats.



2. Prior to the 20th day of February, 1945 claimant submitted invoices to the Bureau of Supplies and Accounts and the Bureau of Ships for sums in addition to the stated contract prices of the contracts involved in this claim. These invoices purported to bill the Navy Department for losses alleged to have been occasioned by reason of changes in specifications and interference by officers and agents of the Government with production under the contracts.

3. On the 18th day of December, 1942 claimant filed a petition in the Federal District Court for the District of Minnesota for reorganization under the provisions of Chapter X of the Acts of Congress relating to bankruptcy and a Trustee in bankruptcy was duly appointed in such proceedings.

4. Thereafter, on the 20th day of February, 1945, pursuant to negotiations looking to the settlement of contractor's claims, the Trustee in bankruptcy and the Government, represented by the Navy Department contracting officers involved, entered into a final settlement agreement covering Contracts NOs-91957, NObs-147 and NXs 3309. Article 3 of the final settlement agreement covering all three of the contracts involved reads as follows:

#### Exhibit A.

"Article 3. Release—The Trustee, for himself, in his capacity as Trustee, for his successors and on behalf of the Contractor, its successors and assigns, remises, releases and forever discharges the Government, its officers, agents and employees and the Government remises, releases and forever discharges the Trustee and his successors and the Contractor, its successors and assigns of and from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions."

5. No request for relief, written or otherwise, except to the extent that the invoices filed might be so considered, were filed by or on behalf of claimant on or before August 14, 1945.

[fol. 6]

## Determination.

1. Claimant relies solely upon the invoices submitted prior to February 20, 1945 as satisfying the requirements of Public Law 657, 79th Congress, 2nd Session and Executive Order No. 9786, that written requests for relief with respect to claimed losses must have been made prior to 14 August 1945. It is, however, unnecessary to decide whether or not the invoices filed constituted written requests for relief with respect to the losses claimed, as, if the invoices are treated as written requests, then the settlement of all claims in law and in equity arising under the contracts in question agreed to on the 20th day of February, 1945 and the mutual release made a part thereof, constituted final action on the requests made within the meaning of Public Law 657 and Section 204 of Executive Order No. 9786. The War Contracts Relief Board is therefore without authority to consider the claim and denies the same.

2. Let the Recorder of the Board notify claimant of this decision by forwarding a copy hereof to Counsel for the claimant by registered mail.

Dated at Washington, D. C. this 3rd day of July, 1947.

/s/ JAS. D. BOYLE,  
James D. Boyle, Rear Admiral, SC, USN  
(Ret. Chairman).

/s/ MARCY M. DUPRE, JR.,  
Marcy M. Dupre, Jr., Captain USN  
Member.

/s/ WILLIAM L. EAGLETON,  
William L. Eagleton, Captain, USNR  
Member.

Certified a true copy.  
DAVID L. HAKE,  
Commander, USNR  
Recorder.

Endorsed: Filed In U. S. District Court On December 1, 1947.

[fol. 8] Notice Of Motion And Motion To Dismiss  
Petitioner's Claim And For Summary Judgment.

To Rollo N. Chaffee, and  
Blum & Jacobson,  
Attorneys for Petitioner,  
First National Bank Bldg.,  
Duluth, Minnesota.

Please Take Notice that the Respondents will move the Court at the place designated for the holding of Court in the United States Postoffice Building, City of Duluth, Minnesota, on the 5th day of March, 1948, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order of this Court to dismiss the claims of the Petitioner herein, and for summary judgment in favor of Respondents, on the following grounds:

(1) That the Complaint and Petition herein fail to allege that Petitioner filed a written request for the relief, with the Navy Board on or before August 14, 1945, as required by Section 3 of the so-called Lucas Act, Public Law No. 657, 79th Congress, Second Session.

(2) That on February 20, 1945, a final and complete settlement of claims stated in the Petitioner's Complaint and Petition, was entered into for a valuable consideration, between the Petitioner and the Respondents, a certified copy of which is hereto attached and made a part hereof, and the said agreement constituted "final action" within the meaning of Paragraph 204 of Executive Order 9786 [fol. 9] (11 F. R. 11533), by reason of which Petitioner is barred from prosecuting the claims set forth in his Complaint and Petition, in this proceeding.

(3) That independent of Paragraph 204 of said Executive Order No. 9786, the Petitioner's claim or claims, are completely barred by reason of said settlement of February 20, 1945.

Respondent's said Motion will be based upon the Petitioner's Complaint and Petition herein, and upon this Mo-

tion and the said Agreement of February 20, 1945, attached to this Motion.

Dated: February 3rd, A. D. 1948.

VICTOR E. ANDERSON,  
United States Attorney.

JAMES J. GIBLIN,  
Assistant United States Attorney.

221 Federal Courts Building,  
St. Paul (2), Minnesota,  
Attorneys for Respondents.

Due and personal service of the within Notice of Motion is hereby admitted this 4 day of February, 1948.

ROLLO N. CHAFFEE,  
BLUM & JACOBSON,  
Attorneys for Petitioner,  
First National Bank Building,  
Duluth, Minnesota.

[fol. 10] Supplemental Contract.

For  
Final Settlement Of Contracts NOs. 91957,  
NObs-147, NXs-3309 And Supplements Thereto  
And Certain Outstanding Notes Issued By  
Inland Waterways, Inc.

Witnesseth:

Whereas, the United States of America (hereinafter called the "Government") and Inland Waterways, Inc., a corporation organized and existing under the laws of the State of Minnesota, whose address is 1000 Minnesota Avenue, Duluth, Minnesota, (hereinafter called the "Contractor") entered into a contract designated NOs-91957, dated 18 September 1941, for the construction of two (2) Submarine Chasers, PC670 and PC671, at a fixed price of one hundred thirty-seven thousand six hundred ninety dollars (\$137,690) per vessel, subject to adjustment as provided in said contract; and

Whereas, the Government and the Contractor entered into a contract designated NObs-147, dated 6 April 1942, for the construction of two (2) additional Submarine Chasers, PC1059 and PC1060, at a fixed price of one hundred thirty-nine thousand eight hundred dollars (\$139,800) per vessel, subject to adjustment as provided in said contract; and

Whereas, the Government and the Contractor entered into a contract, designated NXs-3309, dated 20 April 1942, for the construction of ten (10) 33-ft. Plane Rearming Boats at a fixed price of five thousand three hundred dollars (\$5,300) per boat, subject to adjustment as provided in said contract; and

Whereas, the Government and the Contractor, by supplemental agreements dated, respectively, 30 June 1942 and 30 October 1942, extended said Contract NXs-3309 to provide for the construction of forty-(40) additional Plane Rearming Boats at a fixed price of five thousand twenty-five dollars (\$5,025) per boat, subject to adjustment as provided in said contract; and

Whereas, the Government, acting through the Federal Reserve Bank of Minneapolis as fiscal agent of the Government, and the First & American National Bank of Duluth entered into a V-loan agreement, designated NOfi-5, dated 23 May 1942, (hereinafter called the "guarantee agreement"), whereby the Government guaranteed one hundred percent (100%) of a loan in the maximum amount of one hundred thousand dollars (\$100,000) made by said First & American National Bank to the Contractor (hereinafter called the "guarantee loan"); and

Whereas, by agreement dated 1 October 1942, the Government and the Contractor supplemented said Contract NXs-[fol. 11]-3309 to provide for an advance payment in the amount of twenty-five thousand dollars (\$25,000), bearing interest at the rate of two and one-half percent (2-1/2%) per annum, to be liquidated by withholdings from progress payments under said contract; and

Whereas, no part of such advance payment has been liquidated; and

Whereas, the Government and the Contractor, by amendment dated 3 October 1942, supplemented said Contract



NObs-147 to provide for an advance payment of fifty-five thousand dollars (\$55,900), bearing interest at the rate of two and one-half percent ( $2\frac{1}{2}\%$ ) per annum, to be liquidated by withholdings from progress payments under said contract; and

Whereas, the unliquidated principal amount of such advance payment is twenty-nine thousand nine hundred thirty-seven dollars and one cent (\$29,937.01); and

Whereas, the Contractor delivered Submarine Chasers PC670 and PC671 to the Government with certain defects and deficiencies therein for which the Contractor is responsible under the contract therefor; and

Whereas, the Contractor delivered the first ten (10) Plane Rearming Boats to the Government substantially in accordance with the terms of the contract therefor; and

Whereas, Submarine Chasers PC1059 and PC1060 were not completed by the Contractor on or before the date specified in Contract NObs-147 for delivery of said vessels but were delivered to the Government subsequent to said date with much uncompleted and defective work which was completed and corrected at the expense of the Government; and

Whereas, on 17 December 1942, the Government, pursuant to Section 7 of the guaranteed agreement, purchased the outstanding principal of the guaranteed loan in the amount of forty-three thousand twenty-four dollars and forty-two cents (\$43,024.42), together with accrued interest in the amount of one hundred dollars and twenty cents (\$100.20); and

Whereas, on or about 18 December 1942, the Contractor filed a petition in the District Court of the United States for the District of Minnesota, Fifth Division (hereinafter called the "Court") for reorganization under chapter X of the Acts of Congress relating to Bankruptcy; and

Whereas, by order dated 19 December 1942, the Court granted said petition and appointed Nelson J. Spencer, Vice President of the Contractor, and Edward L. Fogarty (hereinafter called the "Trustees") Trustees to take charge of the property and affairs of the Contractor; and



Whereas, little or no productive work was thereafter performed by, the Trustees in the performance of Contract NXs-3309; and

Whereas, by Order dated 9 January 1943, the Court accepted the resignation of Nelson J. Spencer as additional trustee and ordered that Edward L. Fogarty (hereinafter called the "Trustee") be continued in charge of the Contractor and its affairs; and

Whereas, the Government, on 19 March 1943, requisitioned the Plane Rearming Boats which were partially completed by the Contractor prior to the cessation of its [fol. 12] operations under Contract NXs-3309 and the material and equipment acquired by the Contractor for the construction thereof; and

Whereas, at the time of delivery of said requisitioned property to the Government, certain amounts, including the unpaid balance of the guaranteed loan and accrued interest thereon, the unliquidated principal and accrued interest on the advance payments, the cost of completing incomplete and defective work on Submarine Chasers PC670, PC671, PC1059, and PC1060, and the decreased cost resulting from certain changes in the approved plans and specifications, were due to the Government from the Contractor and certain amounts, including payments for progress in construction, overtime work, changes in the plans and specifications involving increased cost to the Contractor, fuel and lubricating oil left on board Submarine Chasers PC670 and PC671 at the time of delivery thereof, increased costs resulting from increased wage rates established by the Zone Wage Stabilization Standard and amendments thereof applicable to the Contractor's plant, the value of the requisitioned property and the cost of preservation thereof, were due to the Contractor from the Government; and

Whereas, many of said amounts were unliquidated and therefore the net balance with respect to each contract and the net balance with respect to all transactions between the Government and the Contractor and the Government and the Trustee were not known to the Government or to the Trustee; and

Whereas, the Government on 5 May 1943 filed certain claims against the Contractor in the proceedings for its reorganization and the Trustee on 31 July 1943 filed certain counterclaims against the Government in said reorganization proceedings; and

Whereas, subsequent to the filing of the Government's claims against the Contractor and the Trustee's counterclaims against the Government, representatives of the Government and the Trustee tentatively agreed upon certain amounts in liquidation of all claims of the Trustee against the Government,

Now, Therefore, in consideration of the premises, the parties hereto do mutually agree as follows:

Article 1. Scope.—(a) The Government shall pay the Trustee in full satisfaction, payment and discharge of all amounts due from the Government to the Trustee in excess of all amounts due from the Trustee to the Government under or as a result of Contract NOs-91957 the sum of fifty-eight thousand six hundred twenty-nine dollars and eighteen cents (\$58,629.18).

(b) The Government shall pay the Trustee in full satisfaction, payment and discharge of all amounts due from the Government to the Trustee in excess of all amounts due from the Trustee to the Government under or as a result of Contract NXs-3309, and the supplements thereto, the sum of twenty-two thousand eight hundred eighty dollars and twenty cents (\$22,880.20), less interest accrued on the unliquidated advance payment thereunder.

(c) The Trustee shall pay the Government in full satisfaction, payment and discharge of all amounts due from the Trustee to the Government in excess of all amounts due from the Government to the Trustee under or as a result of Contract NObs-147 the sum of twenty-two thousand one hundred eighty dollars and two cents (\$22,180.02), plus interest accrued on the unliquidated advance thereunder.

[fol. 13] (d) The trustee shall pay the Government the sum of forty-two thousand eight hundred fifty-four dollars and nine cents (\$42,854.09), plus interest accrued on said notes, in full satisfaction, payment and discharge of all amounts

due from the Trustee to the Government under the notes issued by the Contractor pursuant to the guaranteed loan and purchased by the Government in the manner hereinabove set forth.

**Article 2. Payment.**—The amounts due from the Government to the Trustee under paragraphs (a) and (b) of Article 1 shall be set off against the amounts due from the Trustee to the Government under paragraphs (c) and (d) of Article 1, and the Government shall, upon submission of invoices therefor by the Trustee in such form and detail as the Bureau of Supplies and Accounts of the Navy Department may prescribe or approve, make payment to the Trustee of the balance so remaining payable to the Trustee.

**Article 3. Release.**—The Trustee, for himself, in his capacity as Trustee, for his successors and on behalf of the Contractor, its successors and assigns, remises, releases and forever discharges the Government, its officers, agents and employees and the Government remises, releases and forever discharges the Trustee and his successors and the Contractor, its successors and assigns of and from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions.

In Witness Whereof, this supplemental contract has been duly executed on the respective dates set forth below.

Date

EDWARD L. FOGARTY,  
Trustee Of Inland Waterways,  
Inc. In Reorganization Under  
Chapter X Of The Acts Of Congress  
Relating To Bankruptcy.

February 13th, 1945

By /s/ EDWARD L. FOGARTY.  
THE UNITED STATES OF  
AMERICA,

17 February, 1945

By F. J. WILLE,  
Contracting Officer, Bureau of  
Ships, Navy Department.

17 February, 1945

By /s/ DONALD P. WELLES,  
Chief of Finance Division,  
Office of Procurement and Ma-  
terial, Navy Department.

20 February, 1945.

By /s/ HOWARD D. FULLMER,  
Purchasing Officer, Bureau of  
Supplies and Accounts, Navy  
Department.

[fol. 14] United States of America  
District of Minnesota.—ss:

I, Thomas H. Howard certify that I am the Clerk of the United States District Court in and for the District of Minnesota; that Edward L. Fogarty who signed this release as Trustee of Inland Waterways, Inc., was then Trustee of said corporation pursuant to the order of said Court; and that this release was duly signed by said Trustee by authority of said Court as shown by the annexed certified copy of the original authorizing Order now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Duluth, Minesota, this 13th day of February, A. D., 1945.

s/ THOMAS H. HOWARD  
Clerk.

by s/ E. Catherine Neff  
Deputy.

State of Minnesota,  
County of St. Louis.—ss:

On this 13th day of February, 1945, before me personally appeared Edward L. Fogarty, known to me and known by me to be the person who executed the above instrument, who, being by me first duly sworn, did depose and say that he is Trustee for Inland Waterways, Inc.; and that he executed the said instrument for the uses and purposes mentioned therein.

s/ H. G. GEARHART  
Notary Public in and for the  
County of St. Louis,  
State of Minnesota.

My Commission expires February 17, 1947

(Notarial Seal)

Certified to be a true copy

M. A. Rooney /s/

Endorsed: Filed in U. S. District Court on February 11, 1948.

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[fol. 18] (Order granting Respondent's Motion for Summary Judgment.)

In the District Court of the United States for the District of Minnesota, Fifth Division

Edward L. Fogarty, as Trustee in Bankruptcy in the Inland Waterways, Inc., a Corporation, Petitioner,  
No. 833 vs. Civil

United States of America and Navy Department—War Contracts Relief Board, Respondents.

On Appeal From the War Contracts Relief Board

The Respondents on April 2, 1948, at the Federal Courts Building, St. Paul, Minnesota, presented to the undersigned Judge of this Court a motion to dismiss the above entitled action and for a summary judgment therein.

Honorable Victor E. Anderson, United States Attorney for Minnesota, Mr. James J. Giblin, Assistant United States Attorney, St. Paul, Minnesota, and Mr. Hubert H. Margolies, Attorney of the Department of Justice, Washington, D. C., for the respondents.

Mr. Rollo N. Chaffee of Duluth, Minnesota, and Mr. George M. Shkoler of Messrs. Blum and Jacobson, Chicago, Illinois, for the petitioner.

On the files and records in the case, the briefs and arguments of counsel, and on due consideration,

It Is Ordered, That the respondents' motion for a summary judgment be and it hereby is granted with costs,

The memorandum hereto attached is made a part hereof.



The petitioner is allowed an exception.

By The Court:

ROBERT C. BELL  
United States District Judge

St. Paul, Minnesota,  
August 28, 1948.

[fol. 19] (Memorandum of United States District Court.)

The petitioner as Trustee in Bankruptcy, prior to VJ-day, had asserted various claims against the Navy Department of the United States on contracts NOs 91957, NObs-147, NXs 3309 and supplements thereto for the construction of submarine chasers and plane rearming boats as contained in invoices submitted to the Department, and the Department had asserted claims against the petitioner. These parties entered into an agreement February 20, 1945, compromising and settling this controversy and the agreement was authorized and approved by this Court. Some of the work furnished by the bankrupt was incomplete and defective and the claims were wholly unliquidated. As stated in the agreement "many of said amounts were unliquidated and therefore the net balance with respect to each contract and the net balance with respect to all transactions between the Government and the Contractor and the Government and the Trustee were not known to the Government or to the Trustee." However, it was agreed that the Department should pay petitioner approximately sixteen thousand dollars. The petitioner received payment. The agreement provided:

[fol. 20] "The Trustee, for himself, in his capacity as trustee, for his successors, and on behalf of the Contractor, its successors and assigns, remises, releases and forever discharges the Government, its officers, agent and employees . . . of and from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions."

The petitioner in February, 1947, filed his claim for relief with the Navy Department under the Act of August 7, 1946, 41 U. S. C. 106 note, 60 stat. 902. This claim was



denied by the Navy Department War Contract Relief Board on July 3, 1947, on the ground that the settlement agreement on February 20, 1945, constituted final action within the meaning of paragraph 204 of Executive Order 9786 (11 F. R. 11553) providing that "no claim shall be considered if the final action with respect thereto was taken on or before" August 14, 1945, regardless of whether the invoices were written requests for relief with respect to losses. This action then was commenced for \$328,804.42 on December 1, 1947, under the Act of August 7, 1946.

The respondents moved to dismiss the complaint and for summary judgment on the grounds that the petitioner had not filed a written request for relief from losses with the Navy Department by August 14, 1945, as required by Section 3 of said act; that the settlement agreement between the petitioner and the Navy Department constituted final action within the purview of paragraph 204 of Executive Order 9786 and notwithstanding paragraph 204 the agreement of February 20, 1945, barred relief. The motion to dismiss in effect was withdrawn. Consequently, the motion for a summary judgment will be given consideration herein.

Respondents also objected that suit could not be maintained against the United States (See *United States vs. Sherwood*, 312 U. S. 584) and that the complaint was jurisdictionally defective and subject to motion to dismiss for failing to include in the complaint the allegation that the plaintiff had filed a written request for relief from losses with the Navy Department by August 14, 1945. These objections in effect were waived by respondents at the hearing. Such defects in the complaint, of course, might have been cured by amendment. It is unnecessary to pass on [fol. 21] these contentions of the respondents since the motion for summary judgment in the opinion of this Court must be sustained on other grounds.

The Court now is concerned with issues as follows: (1) Whether petitioner's claim under the Act of August 7, 1946, submitted to the Court on April 2, 1948, discloses any written request for relief from losses filed with the Navy Department by August 14, 1945; (2) The validity of paragraph 204 of Executive Order 9786; and (3) Whether the

agreement of February 20, 1945, bars the maintenance of this suit.

I. Was a request for relief filed?

Section 3 of the Act of August 7, 1946, provides "Claims for losses shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945."

Congress under the Act of August 7, 1946, intended to limit consideration to a request for relief from loss under the First War Powers Act which was undetermined on August 14, 1945. The copies of alleged requests for relief from losses submitted by the petitioner as a part of his claim under the Act of August 7, 1946, in compliance with paragraph 202 (e) of Executive Order 9786 were merely invoices that had been submitted to two Navy bureaus (The Bureau of Supplies and Accounts and the Bureau of Ships) for sums in addition to the stated contract prices for the contracts involved in the claim; that is, for extras under the contract, and a claim for allegedly requisitioned property. The invoices contained nothing to identify them as Requests for relief from losses and as application for First War Powers Act relief rather than for extras under the contract. Obviously a contractor may present claims for extras without representing either that he sustained a loss or that he seeks relief from a loss. The word "losses" was conspicuously missing. The documents now relied on by petitioner were invoices for money claimed under the contracts. They are not written requests for relief from losses within the meaning of the act. As for the petition, Requisition Navy 120, dated July 23, 1943, on [fol. 22] which petitioner relies, it is not a claim for losses in the performance of a contract for furnishing work, supplies or services to a war agency (Act of August 7, 1946, Section 1) but is a claim to compensation for requisitioned property in the absence of a contract and demands \$35,466.00 as the fair and reasonable value, and \$6,125.39 for the care and conservation of property.

It is not sufficient that a request for some sort of relief was filed. A request for relief from a loss must definitely be a request for an amendment to a contract without consideration under the First War Powers Act. The absence

from the claim filed under the Act of August 7, 1946, of any request for relief from losses bars relief. United States ex rel. Tungsten Reef Mines Co. vs. Ickes, 84 F. 2d 257 (Appeals D. C.); Crimora Managanese Corporation et al. vs. Wilbur, 47 F. 2d 417, 421 (Appeal D. C.) cer. d. 283 U. S. 861; Marshall vs. Wilbur, 47 F. 2d 421, 422, cer. d. 283 U. S. 861. On May 25, 1948, in Jardine Mining Co. vs. R. F. C., District Court of the United States for the District of Columbia, Civil Number 2843-47, Justice Letts entered summary judgment in favor of defendant in a suit under the Act of August 7, 1946, for the reason, inter alia, that plaintiff had failed to file a written request for a relief from losses as required by Section 3 of the Act, since claims for relief under the contract were not requests for relief from losses as required by Section 3 of the Act, since claims for relief under the contract were not requests for relief from losses under the First War Powers Act and the plaintiff neither adverted to any specific losses nor requested First War Powers Act relief. In the case at bar a request for a relief was not filed as required by Section 3 of the Act of August 7, 1946, and paragraph 204 of Executive Order 9786.

## II. Validity of Paragraph 204 Executive Order 9786.

The petitioner has attacked the validity of the President's regulations (Executive Order 9786) and particularly [fol. 23] paragraph 204 thereof. If this paragraph is valid, it is imperative that the motion for summary judgment must be granted. It is proper here to observe that the view of Justice Letts. United States District Court for the District of Columbia, in his order of May 25, 1948, in Jardine Mining Company vs. R. F. C. (unreported) is more acceptable than the opinion of Justice Holtzoff, United States District Court for the District of Columbia, of June 25, 1948, in Warner Construction Company vs. Krug and the United States. (also unreported).

The Act of August 7, 1946, was intended for the benefit of contractors who had filed claims for relief under the First War Powers Act prior to VJ-day which had not been acted on before that date, and which were not considered after VJ-day because of the War Department's interpretation that the power to grant relief under the First War

Powers Act had lapsed as it then was unable to find that allowance would facilitate the prosecution of the war. In other words, the war had ended. Claimants filing before VJ-day who were unable to secure action on their claims solely because of delay in processing were thought to be in an inequitable position as compared to claimants who had succeeded in obtaining a ruling by VJ-day. The act had the limited objective of repairing the injustice whereby some claims might not have been considered on their merits. It was an equalization device. Those whose claims had already been considered were not the objects of Congressional solicitude; their position was not to be improved but was to constitute the yardstick by which the equity of claims which had not been processed by VJ-day might be appraised.

Obviously the subject matter of the act was gratuity legislation, *Work vs. Rives*, 267 U. S. 175; *Nelson vs. Ickes*, 113 F. 2d 515 (Appeal D. C.); *Ickes vs. Cuyuna Mining & Investment Co.*, 69 F. 2d 662 (Appeal D. C.) *cer. d.* 293 & S. 562; *Grover vs. Merritt Development Company*, 47 F. Supp. 309 (D. C. Minn.). To effectuate its objectives a large measure of discretion was vested in the President who was specifically authorized in Section I to issue his regulations within sixty days from the approval of the act. In compliance with this authorization the President promulgated Executive Order 9786. In the light of the nature of the legislation and its history, the regulations are in conformity with the purpose of the act and do not conflict with it; to the contrary they affirmatively make it workable. *United States vs. Antikamnia Chemical Co.*, 231 U. S. 654.

The legislative intent is revealed by the committee reports (S. Rept. 1669, 79th Cong., 2nd Session; H. Rept. 2576, 79th Cong., 2nd Session) accompanying S. 1477, 79th Congress, which became the Act of August 7, 1946. The purpose is explained as follows:

"This bill, as amended, would afford financial relief to those contractors who suffered losses in the performance of war contracts in those cases where the claims would have received favorable consideration under the First War



Powers Act and Executive Order No. 9001 if action had been taken by the Government prior to the capitulation of the Japanese Government. However, upon the capitulation, the "position was taken by certain departments and agencies of the Government involved, that no relief should be granted under the authority which then existed, unless the action was required in order to insure continued production necessary to meet post VJ-day requirements. This was on the basis that the First War Powers Act was enacted to aid in the successful prosecution of the war and not as an aid to the contractors. As a result, a number of claims which were in process at the time of the surrender of the Japanese Government or which had not been presented prior to such time, were denied even though the facts in a particular case would have been justified favorable action if such action has been taken prior to surrender." (Underscoring supplied.)

Insistence that the claims would have received favorable action under the First War Powers Act had there been a ruling prior to VJ-day accompanies the entire course of S. 1477 through Congress. This is revealed by the statement of Senator Lucas in introducing S. 1477 on October 11, 1945, 91 Congressional Record 9564; the statements of Senators Lucas and McCarran on the floor July 16, 1946, 92 Congressional Record 9092. At the hearing on S. 1477 before the Senate Subcommittee of the Judiciary at page 17 Senator Lucas testified that the purpose of the bill was "Nothing more or less than an amendment to the original act, which would give the War Department the power to do the very thing which they claim they did not have the power to do". That the act was substantially a continuance [fol. 25] of Section 201 of the First War Powers Act (50 U. S. C. 611) is reinforced by the limitation of relief to agencies authorized to modify contracts under Section 201 and to losses from which request for relief have been filed by VJ-day.

As a continuance of the First War Powers Act, which empowered the President to authorize agencies and departments to modify contracts without consideration, it was only natural that the act of August 7, 1946 should confer broad authority on the President. Delegation of rule mak-

ing power to the President rather than to the heads of departments highlights the extent of the discretion delegated and the essentially legislative character of the power to issue regulations. The bestowal of such authority must be construed to convey a measure of power adequate to the accomplishment of the purpose. *United States vs. George S. Bush & Co.*, 310 U. S. 371; *Commissioner vs. South Texas Lumber Company*, 333 U. S. 496. It was appropriate for the President to include in his regulations a provision denying a relief on any claim where final action had been taken by VJ-day. Under the circumstances the regulations in effect were a part and parcel of the legislation. To exercise them separate and apart from the act eliminates an organic part of it. Without the authority of the President to make such regulations and thus to complete its broad provisions, it is doubtful if the legislation would have been enacted or approved. Nullification of Paragraph 204 removed limitations and controls Congress affixed to this legislation and produces a statute radically different from that intended by the Act of August 7, 1946. In dealing with such legislation the courts will not violate the intention of Congress by a pretense of adhering to the letter of the law. *Central Hanover Bank & Trust Co. vs. Commissioner*, 2 Cir. 159 F. 2d 167. The legislation does not so plainly and unambiguously support petitioner's contention as to preclude resort to appropriate material for ascertaining the legislative intention and the interpretation of the act. The use of materials here to ascertain the legislative intent seems appropriate. *United States vs. American Associations, Inc. et al.*, 310 U. S. 534; *United States vs. Dickerson*, 310 U. S. 554; *Harrison vs. Northern Trust Company*, 317 U. S. 476; *Mitchell vs. Cohen*, 333 U. S. 411.

[fol. 26] Legislative history leaves no doubt as to the meaning of the act nor as to the validity of the regulations; the President's regulations are integrated into the act and limit departmental, agency, and court allowance alike. Even if petitioner had filed a written request for relief from losses, his recovery under the Act of August 7, 1946, Section 6, might not exceed the amount allowable by the department or agency concerned under the terms of the act, including the regulations. The petitioner's contention of invalidity is not supported by the decisions he cites deal-



ing with regulations at variance with the terms of the statute and promulgated by inferior officers. The Act of August 7, 1946, was gratuity legislation, a broad discretion was delegated, and the purposes of the regulations are entirely consistent with the act. The discretion in issuing regulations depends to some extent on the subject matter. *Hamilton vs. Dillon*, 21 Wall. 73. Here the subject matter was open-end legislation relating to a gratuity. *Work vs. Rives*, 267 U. S. 175.

The exception in the terminal clause of Section 3 of the Act of August 7, 1946, "but a previous settlement under the First War Powers Act, 1941, or the Contracts Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this act" obviously refers to unilateral determination. *Illinois Surety Co. vs. United States To The Use of Peeler et al., Trading As Faith Granite Company*, 240 U. S. 214, and excludes bilateral consensual arrangements. Apart from this consideration the exception clause, read in the light of the manifest purpose of the act (to extend the war-powers act for the benefit of contractors whose claims had not been processed by August 14, 1945) encompassed the following situations: (1) where a contract had already been amended under the First War Powers Act, if performance had continued, and a new request for further relief was under advisement on VJ-day, further consideration might be given; (2) where the department had taken final action on only part of a request, it might proceed to dispose of the whole claim; and (3) a contractor with a number of contracts might have his pending requests considered even though final action had been taken under the First War Powers Act or the Contract Settlement Act of 1944 on his other contracts.

[fol. 27] "Further relief otherwise allowable" means consistent with the basic objectives of the act. It does not revive requests which had been disposed of by VJ-day. In the words of the Navy Department War Contracts Relief Board in *United Concrete Form Products Company*, September 29, 1947, C. C. H. Government Contracts Reporter, 4 C. C. F. Par. 60449: "In order for a claim to be otherwise allowable the right to further relief under the First War Powers Act as to certain portions of the claim would

have had to be specifically reserved for further consideration by the terms of the settlement itself, or a new request for relief, upon which final action was not taken before August 14, 1945, would have had to be submitted. The Statute contains no authority for a department or agency of the government to revive a request for relief upon which final action was taken before August 14, 1945. However, had a new and timely second request been submitted, the previous settlement under the First War Powers Act of the first request would not operate to preclude further relief otherwise allowable under the act based on the second request." The agreement of February 20, 1945, was not entered into by the Navy Department under the authority of either the First War Powers Act or the Contract Settlement Act, for no reference to either source of authority is made therein. The practice of government agencies invoking such special statutory authority was to recite formally in the contract that such authority was being exercised. If the First War Powers Act relief had been requested, or had been granted in the agreement of February 20, 1945, the petitioner would be in no stronger position; because at no point in the consideration of S. 1477 was it suggested that contractors who had asserted First War Powers Act claims, and who had been granted relief, might elect to look upon previous compromises as payments on account, and sue under the act for the difference between the maximum estimate of their claims or net losses and the payments they had theretofore accepted as payment in full.

In the Hearings on S. 1477, before a Subcommittee of the Senate Committee on the Judiciary, 79th Congress, 2d Sess., the following colloquy between Senator McCarran, Chairman of the Subcommittee on S. 1477 and J. Henry Neale, General Counsel for the Navy Department, at pp. [fol. 28] 64-65, demonstrates that the Act of August 7, 1946, was not intended to resurrect previously considered claims, but was designed to eliminate VJ-day as a barrier to the consideration of claims pending undisposed of on that day:

"The Chairman. I do not understand that the idea of the bill is to direct payment of something that was turned down on the merits.

"Mr. Neale. I quite understand, Senator.

"The Chairman. I do not think the Congress of the United States will want to inject itself into a judgment on the merits, on the facts. I think the Congress, if it will want to do anything, will want to so clarify the law that as to the just and equitable case that seems to be precluded from judgment by reason of the condition that has arisen, the condition will be removed so that its merits may be considered. I think that is all the Congress will want to do."

In attacking par. 204 of Executive Order, petitioner has patently misread Section 2(a) of the Act as Guaranteeing contractors against losses sustained without fault or negligence, whereas that section plainly fixes a ceiling or maximum on the amount of the relief allowable and is not in any sense a mandate to award the full amount of the losses. Section 2 itself, the title of the act, "An Act to authorize relief in certain cases, where work, supplies or services have been furnished for the Government under contracts during the war", the direction that the court sit as a court of equity to determine the equities of the claim, and the legislative history, prove that no such guarantee against losses was intended or given all war contractors free from fault or negligence. Moreover "a liability in any case is not to be imposed upon a government without clear words . . . and where, as here, the liability would amount to great sums, only the plainest language could warrant a court in taking it to be imposed . . . . "Pine Hill Coal Co., Inc. v. United States, 259 U. S. 191, 196; of . United States v. Zazove, 68 S. Ct. 1284, 1291.

### III. Effect of settlement agreement.

The Inland Waterways, Inc. had its corporate birth [fol. 29] during the war and was organized for the purpose of obtaining contracts with the government to construct submarine chasers and plane rearming boats. It was financed with government funds. In a comparatively brief period financial difficulties were encountered and a proceeding was commenced under the Bankruptcy Act. A few ships had been built and several were in the course of construction. Much of the work was incomplete and

defective. Labor claims having priority under the law were pressing. Creditors and all parties concerned were desirous of effecting a settlement with the government for the funds claimed due the bankrupt under the contracts.

On February 20, 1945, the date the settlement agreement was executed, the First War Powers Act was in effect. The petitioner presented his claims for money alleged due the contractor at the time. Presumably all claims were presented and considered. If the petitioner had any claims for losses naturally he then would have made them known. In any event a settlement was made and the petitioner, as a trustee in bankruptcy, on behalf of the contractor and with the authority and approval of the court executed an instrument in writing releasing and forever discharging the government \* \* \* of and from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims, and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions". This release was as far reaching and as sweeping in its terms as language could make it. It was executed by parties perfectly capable of contracting, knowing the facts, and dealing at arm's length with each other. It is clear, unambiguous, has not been impeached, rescinded, changed or modified in any respect. The matters now submitted as requests for losses were made integral parts of the settlement agreement. At the time of execution of the settlement contract the First War Powers Act was in effect, but no relief could then have been had under it. The Act of August 7, 1946, conferred no greater rights on the petitioner. The respondents in this case were not bound by any duty, obligation or contract [fol. 30] on which the act could operate, or authorize the petitioner to make a request for losses. Congress was dealing with existing, outstanding, valid claims that had not been paid or settled, situations where claimants might be denied a day in court or a chance to be heard. Congress had no intention of renewing a claim that had been settled and completely terminated by a voluntary act of the parties concerned.

The agreement of February 20, 1945, specifically recites that "many of said amounts were unliquidated and there-



fore the net balance with respect to each contract and the net balance with respect to all transactions between the government and the contractor and the government and the trustee were not known to the government or to the trustee." Thus the agreement compromised unliquidated claims and was not a settlement in the sense of a unilateral administrative determination of the amount due. 31 U. S. C. 71, 72; *Illinois Surety Company v. United States*, supra. The legislative history is barren of any suggestion that a binding and valid compromise, resulting from negotiations of the interested parties supported by a consideration on both sides followed by an exchange of releases may be disregarded by claimants to the gratuity extended to the Act of August 7, 1946. Under Section 6, the court is directed to sit as a court of equity; to regard petitioner as still having requests for relief from losses outstanding on VJ-day and require a determination by the court, despite the absoluteness of the terms the agreement, that it was tentative, and inconclusive as to the petitioner, but final and conclusive as to the United States does not accord with principles of equity. The formality and conclusiveness of a settlement by agreement are essential presuppositions of the Contract Settlement Act, 41 U. S. C. 106 (c) and (e) and Executive Order 9786 paragraphs 308 and 309. The petitioners release was executed after full consideration of the relative advantages and after the usual give and take negotiations with respect to unliquidated claims. Congress [fol. 31] and the officials of the government may desire to exercise the greatest liberalities in dealing with the claims of contractors and courts may extend the principles of equity to the breaking point, but there can be no justification for recognizing the claims for losses presented in this case.

This Court is of the opinion that respondents are entitled to a judgment under the law for the reasons: (1) the petitioner failed to file any written request for relief for losses with the Navy Department on or before August 14, 1945; (2) that, even if petitioner had filed a written request for relief with respect to losses on or before August 14, 1945, final action on such request had been taken prior to August 14, 1945, so that relief is barred by the provisions of paragraph 204 of Executive Order 9786; and (3) that peti-



tioner's compromise on February 20, 1945, of all claims and their release bar relief and all claims held by him for the Inland Waterways, Inc., the bankrupt estate.

By The Court:

ROBERT C. BELL,  
United States District Judge.

St. Paul, Minnesota,  
August 28, 1948.

Endorsed: Filed In U. S. District Court On August 28, 1948.

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[fol. 32]                      Notice Of Appeal To The  
United States Circuit Court Of Appeals  
For The Eighth Circuit.

Notice Is Hereby Given that Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the entire Order granting the Respondents' (Defendants') motion for Summary Judgment, with costs, and from each and every finding and opinion in the Memorandum thereto attached and entered in this action on the 28th day of August, 1948.

BLUM & JACOBSON,  
110 S. Dearborn Street,  
Chicago, Illinois.

ROLLO N. CHAFFEE,  
First National Bank Building,  
Duluth, Minnesota.  
Attorneys for Plaintiff Appellant

October 21, 1948.

• Endorsed: Filed In U. S. District Court On October 21, 1948.

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Edward L. Fogarty, as Trustee in bankruptcy of the Inland Waterways, Inc., a corporation, appellant herein, will rely on the following points on appeal:

1. The District Court erred in granting the respondents' motion for a summary judgment.

2. The District Court erred in granting respondents' motion to dismiss the Complaint.

3. The District Court erred in finding in its Memorandum that the Petitioner Appellant failed to file any written request for relief as required by the Act under consideration by the Court and Paragraph 204 of Executive Order 9786.

4. The District Court erred in finding that Paragraph 204 of Executive Order 9786 is valid and in not finding that said Paragraph 204 of Executive Order 9786 is invalid by reason of its being unambiguous and by reason of its failing to come within the framework of the statute.

5. The District Court erred in considering the legislative history of the Act in construing the validity of Paragraph 204 of Executive Order 9786.

[fol. 36] 6. The District Court erred in its application of the legislative history of the Act in interpreting the validity of Paragraph 204 of Executive Order 9786.

7. The District Court erred in finding in its memorandum that the Act of August 7, 1946, the act under consideration by the Court, conferred no greater rights on the petitioner than the petitioner had before the enactment of such legislation.

8. The District Court erred in construing the intention of Congress as to the purpose of the Act.

9. The District Court erred in going outside of the unambiguous language of the Act for the purpose of ascertaining the intention of Congress.

10. The District Court erred in finding, contrary to the express language of Section 3 of the Act in question, that the previous settlement entered into between the petitioner

and the Government precluded the further relief allowable to the petitioner under the Act in question.

11. The District Court erred in finding that final action had been granted on the petitioner's request for relief prior to August 14, 1945 which would bar the petitioner from obtaining further relief allowable under the Act.

12. The District Court erred in finding that the petitioner failed to file any written request for relief for losses with the Navy Department on or before August 14, 1945.

13. The District Court erred in finding that the petitioner's compromise on February 20, 1945 of all claims and the release given by the Petitioner barred further relief allowable to the petitioner pursuant to the Act in question.

**BLUM & JACOBSON**

**ROLLO N. CHAFFEE**

Attorneys for Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation, Petitioner Appellant.

Endorsed: Filed in U. S. District Court on October 26, 1948.

[fol. 37] State of Minnesota,  
County of St. Louis.—ss:

Rollo N. Chaffee, being first duly sworn, upon oath, says: That he is one of the attorneys for the Petitioner-Appellant in the Statement of Points hereto attached in the action therein entitled; that on the 25th day of October, 1948, he personally served said Statement of Points upon the Respondents-Appellee therein by mailing true and correct copies of said Statement of Points, each copy being enclosed in an envelope with postage prepaid and said envelopes addressed to two of the attorneys for said Respondents-Appellee as follows: One of said envelopes to Hon. John W. Graff, United States District Attorney, Federal Courts Building, St. Paul, Minnesota and the other of said envelopes to Hr. Hubert H. Margolies, At-

torney for the Department of Justice, Washington 25,  
D. C.

ROLLO N. CHAFFEE

Rollo N. Chaffee

Subscribed and sworn to before me this 26th day of  
October, 1948.

(Notarial Seal)

ROBERT J. KARON,  
Notary Public,  
St. Louis County, Minn.

My Commission Expires Dec. 14, 1948.

[fol. 39] (Order of United States Court of Appeals pro-  
viding that Original Claim involved be transmitted  
by District Court for Hearing of Appeal, and Waiv-  
ing Printing.)

United States Court of Appeals, Eighth Circuit

No. 13,857

November Term, 1948.

Edward L. Fogarty, as Trustee in Bankruptcy of Inland  
Waterways, Inc., Appellant,

No. 883 vs. Civil

United States of America and Navy Department-War  
Contracts Relief Board.

Appeal from the District Court of the United States for  
the District of Minnesota.

Motion has been filed by counsel for appellant for an  
order directing that the record on appeal consist of such  
parts of the original papers as set forth in appellant's  
"Designation of Record", or as may be changed by stipu-  
lation of parties or order of this court, under Rule 75(o)  
of the Rules of Civil Procedure, said rule providing that  
whenever a Court of Appeals provides by rule for a hear-  
ing of appeals on the original papers the Clerk of the  
District Court shall transmit them to the appellate court  
in lieu of copies provided for in the rule. After filing of  
said motion it was suggested by the United States attor-  
ney, for appellees, to counsel for appellant "that peti-  
tioner-appellant would be served equally well by a printed

record containing Items 2 through 8 of the Designation, and the submitting to the Court of Appeals, the original of Item 1'', being the original claim involved in this proceeding with many statements and invoices attached. This suggestion so made, it appears, meets with the approval of counsel for appellant.

Having considered said motion and correspondence, It is Ordered by the Court that the part of the record which it appears agreeable to counsel to be printed shall be printed and that the Original of Item 1 of the Designation, the claim involved herein, be transmitted by the Clerk of the District Court to the Clerk of this Court for use or examination by this Court in the consideration and disposition of this appeal, the printing thereof being by the Court hereby waived.

November 16, 1948.

Endorsed: Filed in U. S. District Court on November 24, 1948.

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Filed Mar. 19, 1949. E. E. Koch, Clerk.



[fol. 34] And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz:

(Appearance of Mr. Rollo N. Chaffee as Counsel for Appellant.)

United States Court of Appeals  
Eighth Circuit

Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a Corporation, Appellant,  
No. 13,857 vs.

United States of America and Navy Department-War Contracts Relief Board.

The Clerk will enter my appearance as Counsel for the Appellant.

BLUM & JACOBSON

ROLLO N. CHAFFEE

Attorneys for Appellant.

510 First National Bank Bldg.  
Duluth, Minn.

(Endorsed): Filed in U. S. Court of Appeals, Nov. 5, 1948.

(Appearance of Mr. George M. Shkoler as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

BLUM & JACOBSON

ROLLO N. CHAFFEE

GEORGE M. SHKOLER  
Of Counsel.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 29, 1949.

[fol. 35] (Appearance of Mr. John W. Graff and Mr. James J. Giblin as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

JOHN W. GRAFF  
United States Attorney.

JAMES J. GIBLIN  
Assistant United States  
Attorney.

221 Federal Courts Bldg.,  
St. Paul (2), Minnesota.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 30, 1949.

(Appearance of Mr. Hubert H. Margolies as Counsel for Appellee United States of America.)

The Clerk will enter my appearance as Counsel for the United States, Appellee.

HUBERT H. MARGOLIES  
Attorney, Department of  
Justice,  
Washington, D. C.

(Endorsed): Filed in U. S. Court of Appeals, May 5, 1949.

[fol. 36] (Order of Submission.)

May Term, 1949.  
Thursday, May 5, 1949.

This cause having been called for hearing in its regular order, argument was commenced by Mr. George M. Shkoler for appellant, continued by Mr. Hubert H. Margolies, Attorney, Department of Justice, for appellee, and concluded by Mr. George M. Shkoler for appellant.

Thereupon, this cause was submitted to the Court on the printed record and the briefs of counsel filed herein.

(Opinion.)

United States Circuit Court of Appeals for the  
Eighth Circuit

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No. 13,857.

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Edward L. Fogarty, as Trustee  
in Bankruptcy of the Inland  
Waterways, Inc., a Corpora-  
tion,

Appellant,

vs.

United States of America and  
Navy Department—War Con-  
tracts Relief Board,

Appellee.

Appeal from the  
United States Dis-  
trict Court for the  
District of Minne-  
sota,

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[August 24, 1949.]

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Mr. George M. Shkoler (Messrs. Blum & Jacobson and Mr. Rollo N. Chaffee were with him on the brief), for Appellant.

Mr. Hubert H. Margolies, Attorney, Department of Justice (Mr. H. G. Morison, Assistant Attorney General; Mr. John W. Graff, United States Attorney; Mr. James J. Giblin, Assistant United States Attorney; and Mr. Edward H. Hickey, Special Assistant to the Attorney General, were with him on the brief), for Appellee.

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Before GARDNER, Chief Judge, and THOMAS and RIDDICK,  
Circuit Judges.

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RIDDICK, Circuit Judge, delivered the opinion of the Court.

The appellant, as Trustee in Bankruptcy of Inland Waterways, Inc., brought this action under the War Contracts Hardship Claims Act (Act of August 7, 1946, 41 U.S.C. 106 Note, 60 Stat. 902), popularly known as the Lucas Act, to recover of the United States \$328,804.42 as losses alleged to have been sustained by Waterways in the performance of contracts with the Navy Department. The motion of the United States for a summary judgment, based upon the allegations of the complaint and a written agreement settling certain matters in dispute between the parties, approved by the District Court in bankruptcy, was sustained. Appellant has appealed from the judgment entered on the motion. The question presented is the interpretation of the War Contracts Hardship Claims Act and of Executive Order 9786 promulgated pursuant to the Act.

The facts are undisputed. Waterways entered into several contracts with the Navy Department for the construction of submarine chasers and plane rearming boats. The first of these contracts was dated September 18, 1941, and the last, June 30, 1942. Waterways was financed with Government funds. In a relatively short time after beginning operations under the contracts, Waterways encountered financial difficulties, and in December 1942 filed a petition in the District Court for reorganization under the bankruptcy law. A trustee was appointed to take charge of Waterways' property and affairs.

Little if any progress was made in the performance of the contracts during the management of the trustee. On May 5, 1943, the United States filed claims against Waterways in the reorganization proceedings, and on July 31, 1943, the trustee filed counterclaims against the United States. The trial court described the situation at this time as follows:

"A few ships had been built and several were in the course of construction. Much of the work was incomplete and defective. Labor claims having priority under the law were pressing. Creditors and all parties concerned were desirous of effecting a settlement with the government for the funds claimed due the bankrupt under the contracts."

On February 20, 1945, the claims of Waterways against the Government and the claims of the Government against Waterways were settled by a compromise agreement which was approved by the bankruptcy court. Under the agreement the United States paid the trustee approximately \$16,000 in complete liquidation of all claims. The agreement provides:

"The Trustee, for himself, in his capacity as trustee, for his successors, and on behalf of the Contractor, its successors and assigns, remises, releases and forever discharges the Government, its officers, agents and employees and the Government remises, releases and forever discharges the Trustee and his successors and the Contractor, its successors and assigns of and from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions."

"The aforesaid contracts and transactions" are described in detail in the compromise agreement. The claims asserted against the United States by Waterways were claims for payments due Waterways under the contracts with the Navy Department and for the value of partially completed plane rearming boats and materials and equipment for their construction which the Government had taken under requisition, and for expenses incurred in the conservation of this property for the United States. The claims of the United States against Waterways included the unpaid balance of a loan to Waterways which the Government had guaranteed, and which it had been compelled to purchase on the default of Waterways, together



with interest; the cost incurred by the United States in the completion of incomplete and defective work on submarine chasers; and the decreased cost of performance to Waterways resulting from changes in the plans and specifications for the work being done under the contracts.

After the approval of the compromise settlement by the bankruptcy court and the payment by the United States of the balance due the trustee under that settlement, the trustee filed a claim with the Navy Department under the War Contracts Hardship Claims Act for the "loss" sustained by Waterways in the performance of its contracts with the Navy Department, alleging that the loss was sustained through no fault or negligence on the part of the claimant and that no other relief had been sought from the United States with respect to the loss claimed "other than that as may have been had in proceedings for the reorganization of the claimant under Chapter X" of the Bankruptcy Act. This claim was denied by the Navy Department's War Contract Relief Board on July 3, 1947, and this action for review of the decision of the Navy Department was instituted in the District Court.

The District Court granted the summary judgment from which this appeal is taken on the ground that it conclusively appeared that appellant had not filed with the Navy Department a written request for relief within the meaning of the Act, on or before August 14, 1945, as expressly required by section 3 of the Act and by paragraph 204 of Executive Order 9786; and also on the ground that, conceding that the evidence established that appellant had filed with the Navy Department the required timely written request for relief, further relief under the Act was barred by the settlement of appellant's claims against the Navy Department approved by the bankruptcy court on February 20, 1945. Appellant assigns both rulings of the District Court as error.

Since we have reached the conclusion that the trial court was correct in its ruling on the first question, we do not reach the second. For, if, as we hold, appellant never on or before August 14, 1945, filed a written request for relief under the First War Powers Act, it follows that there was never "a previous settlement" (sec. 3 of the Act of August 7, 1946) of such a claim; and the validity of that part of paragraph 204 of Executive Order 9786 providing that no claim under the Act shall be considered if final action with respect thereto had been taken on or before August 14, 1945, is not involved in the present case. The settlement of February 20, 1945, was not a settlement of claims for relief under the First War Powers Act, but was a final adjudication by the bankruptcy court of appellant's claims against the Navy Department for compensation payable under its contracts with the Navy Department and for the value of property of the appellant taken under requisition by the United States.

The War Contracts Hardship Claims Act is entitled "An Act to authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contracts during the war." So far as material to decision in the present controversy, the Act provides:

Sec. 1. That where work, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 (50 U.S.C., Supp. IV, app., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not in-

cluding diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts. Settlement of such claims shall be made or approved in each case by the head of the department or agency concerned or by a central authority therein designated by such head.

Section 2. (a) In arriving at a fair and equitable settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant under which work, supplies, or services were furnished for the Government between September 16, 1940, and August 14, 1945, and shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U.S.C., Supp. IV, app., sec. 1191), the Contract Settlement Act of 1944 (41 U.S.C., Supp. IV, sec. 101-125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act. \* \* \*

Sec. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.

Sec. 6, as amended provides for review by the Federal courts of departmental action on claims under the Act.

Pursuant to section 1 of the Act, the President on October 5, 1946, made Executive Order 9786 (11 F.R. 11553) entitled "Regulations Governing the Consideration, Adjustment, and Settlement of Claims Under Public Law 657, Approved August 7, 1946." Parts of the Executive Order material here are as follows:

## PART I—DEFINITIONS

101.7 The term "cost of performance" means the reasonable and necessary cost to a contractor or subcontractor of work, supplies, or services furnished during the statutory period pursuant to a contract or subcontract, determined in accordance with the accounting practices of the contractor or subcontractor consistently applied during performance of the contract or subcontract, provided such practices accord with recognized commercial accounting practices. Such cost shall include, to the extent reasonable and necessary, direct costs and a properly allocable proportion of indirect costs, but shall not include the following items:

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n. Any item of cost which the contract or subcontract or renegotiations therefor expressly contemplated would not be reimbursed or compensated or allowed for.

101.8 The term "contract price" means the aggregate of all amounts (before taxes and statutory renegotiation) paid or payable to a contractor or subcontractor for work, supplies, or services furnished during the statutory period pursuant to a contract or subcontract, including any amounts paid or payable pursuant to any amendment, adjustment, or settlement of or on account of such contract or subcontract under the First War Powers Act, 1941, the Contract Settlement Act of 1944 (41 U.S.C., Supp. IV, secs. 101-125), or otherwise.

101.9 The term "loss" means the amount by which the cost of performance of a contract or subcontract exceeds the contract price thereof.

101.11 The term "net loss" means the amount by which the aggregate of the costs of performance under all contracts and subcontracts exceeds the aggregate of the contract prices under all contracts and subcontracts, after giving appropriate effect to action in renegotiation proceedings in respect of the statutory period.

101.12 The term "claim" means a claim for relief under the Act.

## PART II—FILING OF CLAIMS

201. No claim shall be received or considered by any war agency unless properly filed in accordance with the Act and these regulations on or before February 7, 1947.

204. No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date.

## PART III—SETTLEMENT OF CLAIMS

304. No claim shall be allowed by any war agency except if and to the extent that the war agency finds that the claim is (a) equitable under all the circumstances and (b) for losses incurred without fault or negligence on the part of the claimant.

305. No claimant shall be granted relief under the Act and these Regulations in any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant pursuant to which work, supplies, or services were furnished for the Government during the statutory period.

Section 201 of the Act of December 18, 1941 (50 U.S.C., App. 611, 55 Stat. 839), known as the First War Powers Act, provides:

The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems that such action would facilitate the prosecution of the war \* \* \*.



The First War Powers Act was entitled "An Act to Expedite the Prosecution of the War Effort." The Congressional purpose is made clear by the first section of the Act. The powers therein conferred upon the President are conferred "for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy."

The documents upon which appellant relied as written requests for relief under the Act of August 7, 1946, filed with the Navy Department on or before August 14, 1945, were all before the trial court on the motion for summary judgment. They can not be accepted as written requests for relief from losses on the Waterways contracts within the meaning of the Act. They are the identical claims of Waterways against the Navy Department which were finally settled by the agreement of February 20, 1945, approved by the bankruptcy court. They are in no sense claims for "losses \* \* \* incurred \* \* \* without fault or negligence \* \* \* in the performance" of the Waterways contracts, as the word "loss" is used in sections 1 and 3 of the Act and defined in paragraphs 101.9 and 101.11 of Executive Order 9786. They do not purport to be a claim for the difference between the contract price for the performance of any of the Waterways contracts and the actual cost to Waterways for such performance, the claim involved in this action and presented to the Navy Department for the first time in February 1947. They are, in other words, claims for which, if established, the United States was liable at law to Waterways, and for the recovery of which Waterways was entitled to maintain an action at law against the United States.<sup>1</sup> And they were

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<sup>1</sup>28 U.S.C., 1346, 1491.

so treated when finally adjudicated in the bankruptcy court. They are not "equitable" claims within the meaning of the Act.

The Act has no relation to claims against the United States of the character stated in appellant's bills and invoices. On the contrary, ~~the~~ Act deals with an entirely different character of claims, namely, claims for which the United States was never by the force of the contracts obligated, and which but for section 201 of the First War Powers Act and the provisions of the Act of August 7, 1946, no executive or judicial branch of the Government could have entertained or allowed. Claims against the United States with which the Congress was concerned in the Act of August 7, 1946, are claims for losses which a department of the Government could have entertained under section 201 of the First War Powers Act; and claims allowable under the First War Powers Act are not such as the Government was obligated at law to pay, but claims whose recognition and allowance, in the opinion of the department concerned, were necessary to the national security, and whose allowance would, in the opinion of the department, "facilitate the prosecution of the war." Title 1, Paragraph 3, Executive Order 9001, December 29, 1941, 6 F.R. 6787. The primary purpose of the First War Powers Act was the promotion of the national defense in time of great emergency. Contractors were the incidental beneficiaries of the Act. The purpose of the Act of August 7, 1946, as shown by the language of the Act and its legislative history<sup>2</sup> was to secure equal and equitable treatment to contractors in the consideration of claims of the kind which the First War Powers Act authorized certain departments of the Government to allow.

The judgment of the District Court is affirmed.

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<sup>2</sup>H. Rep. 2576, 79th Cong., 2d Sess., pp. 1-21, July 19, 1946; U.S. Code Cong. Service, 1946, p. 1443.

[fol. 48]

(Judgment.)

United States Court of Appeals for the Eighth Circuit

May Term, 1949.

Wednesday, August 24, 1949.

Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation, Appellant,

No. 13,857 vs.

United States of America and Navy Department-War Contracts Relief Board.

Appeal from the United States District Court for the District of Minnesota.

This Cause came on to be heard on the transcript of the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 24, 1949.

[fol. 49]

(Clerk's Certificate.)

United States Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the printed record on which the appeal from the United States District Court for the District of Minnesota was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Court of Appeals for the Eighth Circuit, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Court of Appeals wherein Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a Corporation, was Appellant, and United States of America and Navy Department-War Contracts Relief Board, were Appellees.

I do further certify that on the 13th day of September, A. D. 1949, a mandate was issued out of said Court of Appeals in said cause, directed to the Judges of the United States District Court for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 11th day of January, A. D. 1950.

E. E. KÖCH,

Clerk of the United States  
Circuit Court of Appeals for  
the Eighth Circuit.

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(Seal)



[fol. 48] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1949

No. —

EDWARD L. FOGARTY, as Trustee in Bankruptcy of the Inland  
Waterways, Inc., a Corporation, Petitioner,

vs.

UNITED STATES OF AMERICA AND NAVY DEPARTMENT—WAR  
CONTRACTS RELIEF BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF  
CERTIORARI

Upon Consideration of the application of counsel for  
petitioner,

It Is Ordered that the time for filing petition for writ of  
certiorari in the above-entitled cause be, and the same is  
hereby, extended to and including January 20, 1950.

Tom C. Clark, Associate Justice of the Supreme  
Court of the United States.

Dated this 22nd day of November, 1949.

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[fol. 49] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 13, 1950

The petition herein for a writ of certiorari to the United  
States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of  
the transcript of the proceedings below which accompanied  
the petition shall be treated as though filed in response to  
such writ.

Mr. Justice Douglas took no part in the consideration or  
decision of this application.